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ABSTRACT

The historical involvement of the federal government in the education of the American Indian has always carried with it one clear and consistent underlying theme: the federal government has both explicitly and implicitly acknowledged that there is a federal responsibility to Indian education. Treaties between the United States Government and Indian tribes which provided educational benefits, educational statutory enactments which specifically and implicitly included Indians, the promulgation of regulations concerned with Indian education, and the actions of individuals in a position to influence practical manifestations of Indian education policy have all contributed substantively to the historical development of the federal trust responsibility. This report addresses each of these influences specifically, citing legislation and court litigation, and attempts to define the role of each influence in this historical development. The report concludes that requirements for an Indian Education component within the new Department of Education must include a guarantee of maintenance of the federal trust responsibility, assurance that Indian preference will be implemented as a policy for all of Indian education, and use of the wording "American Indian, Alaska Natives, or Aleuts" in legislation developing the Indian Education Section of the Department of Education. (Author/NEC)

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A "WORKING PAPER" PREPARED FOR
THE NATIONAL ADVISORY COUNCIL ON INDIAN EDUCATION

A LEGAL POSITON PAPER ON INDIAN EDUCATION

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U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE
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MEMORANDUM

TO: Dr. Michael Doss, Director
National Advisory Council on Indian Education

FROM: Kurt Blue Dog, Don Kittson
Native American Rights Fund

RE: Legal Position Paper on Indian Education

DATE: 10 July 1979

I. HISTORICAL BASIS FOR THE FEDERAL TRUST RESPONSIBILITY TO INDIAN EDUCATION

A. Introduction

Throughout the historical relationship between American Indian peoples and non-Indians, one of the primary objectives of the non-Indians has continually been the education of the American Indian. Methods of attempting to accomplish this objective have been diverse and everchanging, ranging from the discliplinary approaches used by early missionaries to civilize and Christianize the Indian, to the use of educational provisions in treaties in exchange for the ceding of Indian lands, to the termination of certain Indian student benefits, and finally to the current era where such an emphasis has been placed on allowing the Indian to dictate his own future, both educationally and otherwise. The historical involvement of the Federal Government in the education of the American Indian, however, has always carried with it one clear and consistent underlying theme: the Federal

Government has both explicitly and implicitly acknowledged that there is a Federal responsibility to Indian education. This Federal responsibility to Indian education is as important to the contemporary Indian as it was to his ancestors. The continued acknowledgement of the Federal responsibility to Indian education will provide the foundation of the Indian society as it moves forward to meet and accept new challenges.

This paper will demonstrate that as with the Federal trust responsibility in general, the Federal trust responsibility to Indian education has taken many different forms in its historical development. Treaties between the United States Government and Indian tribes which provided educational benefits, educational statutory enactments which specifically and implicitly include Indians, the promulgation of regulations concerned with Indian education, and the actions of individuals in a position to influence practical manifestations of Indian education policy have all contributed substantively to the historical development of the Federal trust responsibility. The following discussion will address each of these influences more specifically and attempt to define the role of each influence in this historical development.

B. <u>The Treaty Period: An Exchange of Indian Lands for Many Promises, including Education.</u>

The first formal agreement that the United States

Government would provide education assistance to an Indian tribe occurred in 1794, when the U.S. signed a treaty with the Oneida, Tuscarora, and Stockbridge Indians. Treaty of December 2, 1794, 7 Stat. 47, 48. Article III of the treaty provided for the employment of one or two persons to, among other things, ". . . instruct some young men of the three nations in the arts of the miller and the sawyer." 7 Stat. 47, 48. Subsequent treaties with various Indian tribes consistently carried educational provisions. For example, Article III of the 1803 Treaty with the Kankaskia Indians provided that the United States would give annually for seven years one hundred dollars ($100) toward supporting a priest who would perform the duties of his office and also ". . . instruct as many of their children as possible in the rudiments of literature." Treaty of August 13, 1803, 7 Stat. 78, 79. Other treaty provisions provided for technical education in agriculture and the mechanical arts, support of reservation schools, boarding schools, or schools and teachers generally, and contributions for educational purposes. Felix S. Cohen, Handbook of Federal Indian Law, 239, nn. 23-27 (1941).

The provisions for educating the Indians were generally included in the treaties in exchange for Indian lands. The obvious difference between the early missionaries and religious groups, and the Federal Government was that the

missionaries had ambitions of civilizing and Christianizing the Indians, whereas the Federal Government thought more of civilizing the Indians in terms of the value of possessing Indian lands. S.Rep. No. 91-501, 91st Cong., 1st Sess. 11 (1969). The aim was to convert Indians from hunters into farmers, whereby the Indians would require less land and be easier to contain. This would mean more lands for non-Indian settlers. Education was seen as the means of accomplishing the conversion. S.Rep. No. 91-501, supra at 11.

From this fundamental approach to handling the "Indian problem" sprang a policy of "education by assimilaton." The attempt to make an Indian settle down on a piece of limited acreage combined with altruistic and economic objectives of "converting the heathen" and "civilizing the savage" to give impetus to the move to educate the Indian. The Report of the Senate Special Subcommittee on Indian Education states, "Education was the means whereby we emancipated the Indian child from his home, his parents, his extended family, and his cultural heritage. It was in effect an attempt to wash the 'savage habits' and 'tribal ethic' out of a child's mind and substitute a white middle-class value system in its place." S.Rep. No. 91-501, supra at 9.

The treaty period ended in 1871. Act of March 3, 1871, 16 Stat. 544, 566. It provided the framework for

future relationships between the United States and Indians in which the Federal responsibility to educate Indians became more apparent from a collective perspective.

C. Legislation During and After the Treaty Period Reflecting the Acknowledgement of a Federal Responsibility to Indian Education.

Congress first acknowledged the Federal responsibility to Indian education in the Act of March 30, 1802, 2 Stat. 139. A sum of money not to exceed $15,000 was appropriated. This appropriation was to be used to "promote civilization among the friendly Indian tribes, and to secure the continuance of their friendship . . . ." Act of March 30, 1802, supra at 143. Civilization usually meant educating the Indians in the ways of the non-Indian lifestyle.

Manifestations of the Federal responsibility to Indian education remained fairly stagnant until 1817, when President Monroe voiced a call for additional efforts to preserve, improve and civilize the original inhabitants. Cohen, supra at 239, n.29. Congress responded to President Monroe's call by passage of the Act of March 3, 1819, 3 Stat. 516. This Act has served as the basis for most Indian education programs. It has been codified as 25 U.S.C. § 271 (1970), and reads:

> The President may, in every case where he shall judge improvement in the habits and condition of such Indians practicable, and

> that the means of instruction can be introduced with their own consent, employ capable persons of good moral character to instruct them in the mode of agriculture suited to their situation; and for teaching their children in reading, writing, and arithmetic, and performing such other duties as may be enjoined according to such instructions and rules as the President may give and prescribe for the regulation of their conduct, in the discharge of their duties. A report of the proceedings adopted in the execution of this provision shall be annually laid before Congress.

The Act of 1819 also carried with it a permanent annual appropriation of $10,000 for the above purpose. 1/ This Act was the first Federal acknowledgement of a permanent Federal responsibility to Indian education and supplied a foundation for future Federal involvement in this area. The Act sought to attain the objective of preserving the Indian nations, by civilizing the Indians and converting them from hunters to agriculturalists. However, it did not grant the

. . . . . .

1/ This permanent appropriation was repealed in the Act of February 14, 1873, 17 Stat. 437, 461. It appears that the Federal Government began to appropriate to tribes on an individual needs system insofar as education is concerned. For example, the 1873 Act provided for such expenditures as the President may determine is necessary ". . . in instructing in agricultural and mechanical pursuits, in providing employees, educating children . . ." for a number of different tribes including the Gros Ventres, Mandans, Assinaboines, Cheyennes, and Blackfeet. 17 Stat. 440 (1873). Cohen notes that the pre-1873 permanent annual appropriation had become known as the "civilization" fund. Cohen, supra at 240, n.31.

Federal Government any power of compulsion for purposes of education; the consent of the tribe concerned was required for implementation of the Act.

The importance with which Congress viewed the Federal responsibility to Indian education became evident once again in 1832 when the office of the Commissioner of Indian Affairs was created. Act of July 9, 1832, 4 Stat. 564. The Commissioner, under the direction of the Secretary of the Interior, was charged with the management of all Indian affairs, including education. Early Commissioners took a rather negative attitude toward Indians, viewing them as ". . . barbarous and heathen people 'wedded to savage habits, customs, and prejudices', and thus their educational policies revolved around controlling the Indian through coercive assimilation." S.Rep. No. 91-501, supra at 11. The result was a program of manual training in agriculture and the mechanic arts, and by 1838 the Federal Government was operating 16 manual schools with eight hundred (800) students and eight-seven (87) boarding schools with approximately 2,900 students. Thus, the Federal policy of educating the Indian as a method of civilizing him was being realized at this time through manual and boarding schools.

Subsequent legislation augmented the Federal responsibility to Indian education. The Act of July 31, 1882,

22 Stat. 181, provided that the Secretary of the Army could turn over abandoned military posts to the Secretary of the Interior, so that they might be used in the education of Indian youth. In 1882 Congress also made an appropriation of $68,000 for an Indian industrial school at Carlisle, Pennsylvania, and a further appropriation of $150,000 for the support of industrial schools and other educational purposes to benefit the Indian. Act of May 17, 1882, 22 Stat. 68, 85. Carlisle was joined by other off-reservation industrial boarding schools such as Chemawa (1880), Albuquerque (1884), Santa Fe (1890), Pierre (1891) and Flandreau (1893). Margaret Szasz, Education and the American Indian 10 (1974). By 1900, twenty-five off-reservation industrial boarding schools had opened. The educated Indian youth of this period returning home ". . . became the first victims of the 'either/or' policy of assimilation. Their education forced them to choose either the culture of the white man or the culture of the Indian; there was no compromise." Szasz, supra at 10.

The Federal policy of educating the Indian also has a direct connection with the General Allotment Act of 1887, 24 Stat. 388. The G.A.A., or the Dawes Act as it is popularly known, gave land allotments to individual Indians with the intentions of breaking up the tribal structure and allowing Indians an opportunity for a more "civilized" life. The land

policy espoused in the Dawes Act was directly related to the Indian education policy because the proceeds from the destruction of the Indian's land base were to be used to pay the costs of taking Indian children from their homes and placing them in Federal boarding schools. Thus, the individual Indian ostensibly would require less land to survive, and his children would be educated away from home, where acceptance of the non-Indian ways would be easier. The education policy "was designed to separate a child from his reservation and family, strip him of his tribal lore and mores, force the complete abandonment of his native language, and prepare him for never again returning to his people." S.Rep. 91-501, supra at 12.

The attitude of the Federal Government toward Indians and the education of Indian youth during the late 1800s and early 1900s is best characterized as an attitude of forced assimilation and forced education. Indians resisted the Federal policies by refusing to send their children to school. Under the guise of a Federal responsibility to educate the Indian, an attempt toward compulsory attendance of Indian children at school was made by authorizing the Secretary of the Interior to "withhold rations, clothing and other annuities from Indian parents or guardians who refuse or neglect to send and keep their children of proper school

age in some school a reasonable portion of each year." Act of March 3, 1893, 27 Stat. 612, 635. This Act is codified as 25 U.S.C. § 283 (1970). A subsequent statute in 1920 further empowered the Secretary of the Interior with the authority to make and enforce such rules and regulations as he deemed necessary to compel the attendance of eligible Indian children in both B.I.A. and state public schools. 25 U.S.C. § 282 (1963).

If there was any doubt as to the intentions of the Federal Government to educate its red-skinned wards, these authorizations of power to the Secretary washed away those doubts. The coerced education and assimilation of the American Indian was in full swing.

However, Congress also provided some protection for Indian children by passage of legislation in 1844 which provided that no Indian child shall be removed "from any Indian reservation to a school beyond the State or Territory in which said reservation is situated without the voluntary consent" of either the parents of the child or the next of kin. 25 U.S.C. § 286 (1963) Further protection of the Indian child was provided in the Act of June 10, 1896, 25 U.S.C. § 287 (1963), which said that no Indian child could be taken from any school in a State or Territory without the written consent of the parents or against the child's will.

A summary analysis of latter 19th century and early 20th century Indian education legislation leaves a number of conclusions to be drawn: (1) the education of the Indian was being accorded special consideration; (2) the allotment policy dictated a follow-up approach of civilizing the Indian through education; and (3) manifestations of the Federal responsibility to Indian education was being evidenced through both beneficial and detrimental legislation, which suggested that the Federal Government for better or for worse fully intended to take the responsibility for educating the Indian.

During this same period, there were four major forms of Indian education: (1) off-reservation industrial boarding schools (intended to take the Indian child far away from his home and native environment); (2) reservation boarding or day schools (less expensive and more acceptable to parents than off-reservation boarding schools); (3) public schools (usually occurring first on allotted reservations because the white settlers wanted education for their children, and viewed as the best solution to the problems of Indian education by the promoters of assimilation); and, (4) mission schools (which educated a consistently small percentage of Indian children). Szasz, Education and the American Indian 10, 11 (1974). Despite viable alternatives, the Federal

Government during the assimilation period continued to emphasize the removal of Indian youth from their native environment to an educational institution some distance from any reservation.

Another cornerstone in the Federal trust responsibility to Indian education was laid with passage of the Snyder Act of 1921, 25 U.S.C. § 13 (Cum. Supp. 1978). This Act provided, "The Bureau of Indian Affairs, under the supervision of the Secretary of the Interior, shall direct, supervise, and expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians throughout the United States for the following purposes:

> General support and civilization including education."

The Snyder Act thus empowers the BIA with the authority to expend and establish such educational programs as benefit Indians. Further, assistance programs established under this section are for the special benefit of Indians and the Courts have continually held that Indian communities, and/this section must be liberally construed in their favor. Fox v. Morton, 505 F.2d 254 (9th Cir. 1974); Ruiz v. Morton, 462 F.2d 818 (9th Cir. 1972), aff'd. 415 U.S. 199 (1974). This Act has lead to the establishment of many of the BIA educational programs which provide benefits

to Indians.

The failings of the Federal Government in its responsibility to Indian education were spelled out in the Meriam Report of 1928, published as The Problem of Indian Administration. The Meriam Report, prepared by the Brookings Institution, made two major findings: (1) Indians were excluded from management of their own affairs, and (2) Indians were receiving a poor quality of services (especially health and education) from public officials who were supposed to be serving their needs. (Meriam Report, The Problem of Indian Administration 9 1928).

The Meriam Report was highly critical of boarding schools, because of their inadequate facilities and the manner in which they were operated. The Report also stressed the need for a relevant instructional curriculum adapted to individual needs and backgrounds of the students. It questioned the lack of participation by Indians in deciding the direction of their schools, and advocated strengthening the Indian family and social structure, and obtaining teachers in Indian schools with high qualifications. The Report noted that "the most fundamental need in Indian education is a change in point of view." (Meriam Report, The Problem of Indian Administration 346 1928).

The impact of the Meriam Report was substantial, resulting in several new actions on the part of the Federal Government

The allotment period was ended in 1934 by the Indian Reorganization Act, 25 U.S.C. § 476 (1963), which also provided a method whereby tribal governments could be more autonomous. The new Commissioner of Indian Affairs, John Collier, started programs in bilingual education, adult basic education, training of Indian teachers, Indian culture, and in-service teacher training. S.Rep. No. 91-501, supra at 13. Collier also closed down numerous boarding schools and replaced them with day schools, which resulted in attendance of two-thirds of the Indian children in day schools by 1943. Collier's approach emphasized education of the Indian in an atmosphere conducive to a positive attitude by Indian students toward Anglo-Saxon education, and underscored the necessity of the Federal Government following the Indian lead in Indian education.

The Johnson-O'Malley Act (JOM) was also passed in 1934. 25 U.S.C. §§ 452-56 (1963). Prior to the Citizenship Act of 1924, 8 U.S.C. § 1401(a)(2)(1963), most Indians were not citizens and did not possess the right to attend state supported public schools. The education of Indians was the sole responsibility of the Federal Government. However, after passage of the Citizenship Act many Indian children began attending state public schools. This created a financial burden on state school systems, since they are financed

largely from local property taxes and most Indian land is held in trust by the Federal Government and therefore not subject to local taxation. As a result of this situation, and as an inducement for the states to accept Indian children into the state public school systems, federal financial assistance to the state had begun in the late 1800s. JOM was therefore a comprehensive culmination of a federal assistance policy designed to get Indian children into state public schools, while not shirking the federal responsibility to Indian education.

JOM originally empowered the Secretary of the Interior with the authority to enter into contracts with any state or territory ". . . for the education, medical attention, agricultural assistance, and social welfare, including relief of distress, of Indians . . ." within that particular state or territory. 48 Stat. 596 (1934). The Secretary was also authorized to expend such monies as he saw fit in the fulfillment of the purposes mentioned, and to establish minimum standards of services not less than the highest standards maintained by the state or territory. The number of entities eligible to contract with the Secretary of the Interior to provide for implementation of JOM was subsequently increased to include various private as well as state entities. 49 Stat. 1458 (1936).

JOM funds have proven to be a tremendous financial boost to state public shool districts. For example, in the twenty-five year period from 1949-1969, approximately $130,000,000 in appropriations were made by Congress for payments to states under JOM. S.Rep. No. 91-501, supra at 47. There is no indication at this time that such Federal funds to provide for Indian education will cease in the future.

Two key features of JOM must be mentioned briefly. First, JOM was passed exclusively for Indians. Benefits accruing to Indians were the primary objectives of JOM. This fact in and of itself is indicative of the special consideration accorded Indian education by the Federal Government. Second, JOM confers broad authority in the Secretary of the Interior and his agent, the B.I.A. JOM contracts have traditionally been limited to execution with states and confined to education. However, the scope of the statute is much broader, and apparently authorizes contracts covering almost every activity beneficial to Indians. Further, contracts may be negotiated with any responsible public or private agency, including tribally sponsored organizations. Despite the broad scope of JOM, it has been narrowly utilized for the most part, to the exclusion of other possible health and welfare uses. The broadness of the statute in terms of applicability and potential contracting agencies indicates

the intent of the Federal Government to make available to Indians a diversity of educational opportunities not available in a standard state public school system.

There was a reversal of Federal policy toward Indian education during the termination period. The old policy of coercive assimilation returned, and "the goals were to get rid of Indians and Indian trust land by terminating Federal recognition and services, and relocating Indians into cities off the reservation - a policy viewed as a major catastrophe by the Indians." S.Rep. No. 91-501, supra at 14. Indian education suffered because the B.I.A. closed down all Federal schools in Idaho, Michigan, Washington and Wisconsin. Indian students were transferred to public schools and loans to Indian students under the Indian Reorganization Act were discontinued. S.Rep. No. 91-501, supra at 14. The policy of educating Indian children far from their homes continued. The avowed objective of terminating all Federal services to Indians, including education, appeared headed toward realization until the 1960s, when the Commission of Rights, Liberties, and Responsibilities published a study which focused on the injustices of the termination policy, the manner in which the B.I.A. administered services to the Indians, and the inadequacy of services provided to the Indians. This study will be further addressed later in this paper.

The Federal Government had also seen fit to include Indians within the "impacted areas" legislation of the 1950s. This legislation refers to the Federally Impacted Areas Act of 1950 (F.I.A.A.), 20 U.S.C. §§ 236-41-1 (1963), and the School Facilities Construction Act of 1950 (S.F.C.A.), 20 U.S.C. §§ 631-47 (1963). P.L. 81-874, as F.I.A.A. is popularly referred to, was designed to assure that a federal connection, such as living on tax-exempt land, did not cause any financial burden to local school districts. P.L. 81-874 authorized federal payments to local school districts to help defray general operating expenses.

Indians would be affected by the criteria of P.L. 81-874 because many live on Indian lands which enjoy the status of being tax-exempt lands.

Section 6 of the General Allotment Act of 1887, 25 Stat. 388, states that when the Secretary of the Interior is satisfied that any Indian allottee is competent and capable of managing his own affairs, then the Indian allottee may be issued a patent in fee simple. "Thereafter, all restrictions as to sale, encumbrance, or taxation of the land shall be removed . . . ." The Supreme Court in Squire v. Capoeman, 351 U.S. 1, 8 (1955), held Section 6 of G.A.A. to indicate ". . . a congressional intent to subject an Indian allotment to all taxes only after a patent in fee is issued to the allottee.

This, in turn, implies that until such time as the patent is issued, the allotment shall be free from all taxes, both those in being and those which might in the future be enacted."

Section 5 of the Indian Reorganization Act of 1934, 48 Stat. 985, also exempts lands acquired by the United States in trust for Indian tribes from state and local taxation. Further, a Solicitor's opinion has ruled that an Indian tribe, whether incorporated or unincorporated, is entitled to the same degree of exemption from state taxation as may be claimed by any other federal instrumentality. (Solicitor's Opinion M-27810, 1934).

In addition, the IRS has said that Indian tribes are not a taxable entity and general federal taxation laws do not apply to them because of the quasi-sovereign status which is accorded Indian tribes. Rev. Rul. 67-284, 167-2 Cum. Bull. 55. This ruling also provided generally for an exemption where the land is held in trust by the United States Government.

The basis of the decisions in U.S. v. Rickert, 188 U.S. 432 (1902), and Dewey County, S.D., v. U.S., 26 F.2d 434 (8th Cir. 1928), was stated in Warren Trading Post v. Arizona State Tax Commissioner, 380 U.S. 685, 691 (1965), when the Court said, "And since federal legislation has left the state

with no duties or responsibilities respecting the reservation Indians, we cannot believe that Congress intended to leave to the state the privilege of levying this tax." Thus, Indian lands held in trust by the U.S. Government have enjoyed exemption from taxation.

Indian children eligible for educational services under an agreement, grant or contract with the U.S. Government were originally specifically excluded from coverage under P.L. 81-874. 64 Stat. 1108 (1950). The net effect was to prevent P.L. 81-874 funds from going to school districts getting funds under JOM. However, the restriction was removed in 1958 pursuant to the special considerations given to Indian education and today the law allows payments under both JOM and impacted areas programs. 2/ 20 U.S.C. § 243(d) (1963). Thus, school districts which provide education for children residing on federal property, including Indian land, are eligible for aid under P.L. 81-874 and 81-815.

P.L. 81-815, as S.F.C.A. is generally known, provides federal aid for building and construction costs.

2/ JOM was amended in 1975 to require that the prospective contractor submit to the Secretary of the Interior an educational plan containing educational objectives which: (1) addresses the educational needs of the Indian students who are to benefit from the contract, and (2) assures that teh contract is capable of meeting such objectives. 25 U.S.C. § 455 (Cum. Supp. 1978).

The original intent of P.L. 81-815 was to aid local educational agencies in building urgently needed minimum school facilities in school districts which had experienced substantial increases in school membership as a result of new or increased Federal activities. 20 U.S.C. § 231 (1963). Difficulties arose when school districts containing Indian children could not show any substantial increase in their federally caused enrollment because the Indian children has always been there.

P.L. 81-815 was amended in 1953 and again in 1967 to permit federal aid for building and construction costs to local educational agencies providing free public education for children who reside on Indian lands where: (1) the total number of such children represents a substantial percentage of children for whom the agency provides free education, or (2) where the immunity of Indian lands to local taxation has created a substantial and continuing impairment of the ability of the local educational agency to finance needed school facilities. 20 U.S.C. § 644(a), (b)(1970). The Commissioner generally has wide discretion in arranging federal aid to local school districts containing Indian children, and he may waive the substantial percentage requirement "whenever, in his judgment, exceptional circumstances exist which make such action necessary to avoid inequity and avoid defeating the

purposes of this section." 20 U.S.C. § 644(b)(1970).

These two acts are an indication of the special treatment accorded Indian education, when both acts were amended to include Indian children enrollment where their exclusion had been specifically provided for. Because of the actions taken to bring Indian children within the purview of P.L. 81-815 and P.L. 81-874, it is obvious that the Federal Government was mindful of a Federal responsibility to Indian education,and once again attempted to comply with that responsibility.

The post-termination period brought with it a new attitude toward Indian education. The study of the Commission on Rights, Liberties and Responsibilities, referred to earlier, had advocated reorganization of the B.I.A.'s education program and increased Indian involvement in determining programs affecting Indians. S.Rep. No. 91-501, supra at 15. The Federal Government took note of the Commission's recommendations, and Indians were eventually included in the Elementary and Secondary Education Act of 1965, 79 Stat. 27 (1965). E.S.E.A. provided funds for improving the education of disadvantaged children. Indians in Federal schools were involved in Title I of the Act (innovative programs for disadvantaged children) in 1966, and in fiscal year 1969 approximately $9,000,000 was was appropriated specifically

for Indians in Federal schools. S.Rep. No. 91-501, supra at 16. Indians also benefit from other titles of the Act which refer to dropout prevention, bilingual education, and the development of special supplemental centers and regional educational laboratories. S.Rep. No. 91-501, supra at 16.

The next piece of legislation which had a substantial impact on Indian education was the Indian Education Act of 1972, 86 Stat. 334. This Act, which is actually Title IV of the Education Amendments of 1972, 86 Stat. 235, specifically amended P.L. 81-874, supra, by adding as Title III "Financial Assistance to Local Educational Agencies for the Education of Indian Chilren." Title III of P.L. 81-874 then became Title IV of the same Act. In the declaration of policy, the special educational needs of Indian children were recognized and the policy of the United States was stated to be financial assistance to local educational agencies for "elementary and secondary school programs specially designed to meet these special educational needs." 20 U.S.C. § 241 aa (1974).

Part B of the Title IV, 20 U.S.C. § 887c(a), (b), (c) (1974), amended Title VIII of the Elementary and Secondary Education Act of 1965, supra, by adding to E.S.E.A. a section providing for special programs and projects to improve educational opportunities for Indian children. This includes grants for planning, pilot and demonstration projects, and

the operation of preservice and inservice training programs for persons serving Indian children as education personnel. An appropriation of $25,000,000 for the fiscal year ending June 30, 1973, and $35,000,000 for each of the next two fiscal years was provided for implementation of Part B 86 Stat. 341.

Part C of Title IV, 20 U.S.C. § 1211 a (1974), amended Title III of E.S.E.A. (the Adult Education Act) by adding special programs relating to adult education for Indians. An appropriation of $5,000,000 for the fiscal year ending June 30, 1973, and $8,000,000 for each of the next two years was provided for implementation of Part C. 86 Stat. 343.

Part D of Title IV, 20 U.S.C. § 1221 (1974), established an Office of Indian Education within the Office of Education, which is headed by a Deputy Commissioner of Indian Education charged with the responsibility of administering Title IV programs. Part D also established a National Advisory Council on Indian Education which, among other things, "shall advise the Commissioner of Education with respect to the administration . . . of any program in which Indian children or adults participate from which they can benefit, . . . and with respect to adequate funding thereof;" 20 U.S.C. § 1221 g (1974).

Part E of Title IV amended the Higher Education Act of 1965, 79 Stat. 1219, by providing Indian preference in the training of teachers for children living on reservations serviced by elementary and secondary schools for Indian children. 20 U.S.C. § 887c(d) (1974). Part E also recognized as a local education agency within Title IV "a nonprofit institution or organization of the Indian tribe concerned which operates any such school and which is approved by the Commissioner (of Education) . . . ." 86 Stat. 345.

The Indian Education Act of 1972 was perhaps the most encompassing piece of Indian education legislation to that point in time, dealing with all facets of Indian education. The objective of the Federal Government in approving and appropriating monies for I.E.A. appears to be the upgrading, expansion, and overseeing of Indian education. The responsibility of the Federal Government to Indian education was never more apparent than in I.E.A., which provided special educational programs for Indian adults, Indian children, and those persons who would provide educational instruction for Indians. Evidence of the popularity of I.E.A. is the fact that as S. 2482 it passed the Senate 57-0 on October 8, 1971. 1972 U.S. Code Cong. and Adm. News 2595.

Doubtless, the most explicit Federal acknowledgement of a responsibility to Indian education occurs in P.L. 93-638,

the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 455-458e (Cum. Supp. 1978). P.L. 93-638 is for the benefit of Indians alone, and was intended "to promote maximum Indian participation in the government and education of the Indian people; . . . to establish a program of assistance to upgrade Indian education; to support the right of Indian citizens to control their own educational activities . . ." 1974 U.S. Code Cong. and Adm. News 7775, 7776. The Act itself begins with the language, "The Congress, after careful review of the Federal Government's historical and special legal relationship with, and resulting responsibilities to, American Indian people, . . . " 88 Stat. 2203 (1975). The declaration of policy within the Act states that "The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities." 88 Stat. 2204 (1975).

P.L. 93-638 goes on to provide for the Secretary of the Interior and the Secretary of H.E.W. to contract with Indian tribes or tribal organizations for tribal operations of B.I.A./I.H.S. programs and services. It also amended JOM

in order to provide more Indian control of assistance contracts to public schools enrolling Indian students, and authorized the Secretary of the Interior to provide assistance for construction to public schools enrolling Indian students. 1974 U.S. Code Cong. and Adm. News 7776.

The explicit acknowledgement by the Congress of a "historical and special legal relationship" with Indians and "resulting responsibilities" therefrom reaffirms the [redacted]tance by the Federal Government of a Federal responsibility to Indian education. P.L. 93-638 is then another attempt by the Federal Government to comply with that responsibility.

Finally, the 95th Congress enacted two major pieces of legislation which specifically address the area of Indian education. P.L. 95-471, the Tribally Controlled Community College Assistance Act of 1978, 25 U.S.C. §§ 1801 et. seq. (Cum. Supp. 1978), provides grants for the operation and improvement of tribally controlled community colleges. A total of $89.6 million was appropriated for this purpose. To be eligible for assistance, a tribally controlled community college must meet three criteria under 25 U.S.C. § 1804 (Cum. Supp. 1978): (1) be governed by a board of directors or board of trustees a majority of which are Indians; (2) demonstrate adherence to stated goals, a philosophy, or a plan of operation which is directed to meet the needs of Indians; and

(3) if in operation for more than one year, have students a majority of whom are Indians.

The other piece of legislation concerned with Indian education is Title XI of the Education Amendments Act of 1978, 25 U.S.C. § 2001 et. seq. (Cum. Supp. 1978). P.L. 95-561, as it is normally referred to, provided for the development of standards for the basic education of Indian children who are attending B.I.A. schools or schools contracting with the B.I.A. 1978 U.S. Code Cong. and Adm. News 5087. P.L. 95-561 also called for the following actions within the B.I.A. programs: creation of a national criteria for dormitory living environments; development of a system establishing priorities for school construction projects; transfer of responsibility and authority over all B.I.A. education programs to the Director of the Bureau's Office of Indian Education Programs; a system for allotting B.I.A. education program funds based on per capita student counts; uniform and direct funding and support for B.I.A. and contract schools; exemption from civil service competitive exams in the hiring of new educational employees of the Bureau; establishment of computerized information system between the agencies, areas, and central office; a policy paper by the Office of Indian Education Programs within the B.I.A. setting forth education policies, procedures and practices for all

educationally-related activities; and active recruitment of Indian educators by the Secretary of the Interior. 1978 U.S. Code Cong. and Adm. News 5087-5094.

P.L. 95-561 also authorized I.E.A., supra, for five more years and provided an amendment which allows assistance for culturally related academic needs. 1978 U.S. Code Cong. and Adm. News 5095.

P.L. 95-471 and P.L. 95-561 are clear manifestations of compliance with the Federal responsibility to Indian education. The fact that the two Acts are specifically designed to address the educational needs of Indians is yet a further example of the special treatment and considerations accorded Indians by the Federal Government.

D. Summary and Conclusion

The basis of the federal trust responsibility to Indians in general is found in a number of foundational cases. The Indian tribes in early American cases were characterized as ". . .denominated domestic dependent nations. . ." Their relation to the United States resembles

that of a ward to his guardian." Cherokee Nation v. Georgia, 30 U.S. 1 (1831). The issue of tribal sovereignty arose a short time later, and the Supreme Court stated that Indian nations ". . .had always been considered as distinct, independent political communities, retaining their original natural rights. . ." Worcester v. Georgia, 31 U.S. 515 (1832). An explicit judicial declaration of a trust responsibility occurred in Seminole Nation v. United States, 316 U.S. 286 (1942), when the Court stated, "Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it (the Government) has charged itself with moral obligations of the highest responsibilities and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards."

A major manifestation of the general trust responsibility has been realized in the area of Indian education. As outlined above, the Federal Government has historically attempted to educate the Indian almost from their initial contact with each other. As this paper has repeatedly demonstrated, Indians have consistently been singled out for special treatment in applicable educational legislation. This

trust responsibility is nowhere more apparent than in more recent legislation such as P.L. 93-638, the Indian Self-Determination and Educational Assistance Act. P.O. 93-638 explicitly acknowledges the Federal responsibility to Indian education by use of such language as a "historical and special relationship" with "resulting responsibilities." The sum result of such language in a key piece of legislation like P.L. 93-638 can only lead to the conclusion that the Federal Government has long ago accepted and confirmed the proposition that there is a Federal trust responsibility to Indian education.

II. REQUIREMENTS FOR AN INDIAN EDUCATION COMPONENT WITHIN THE NEW DEPARTMENT OF EDUCATION

A. Guarantee of Maintenance of Trust Responsibilities

This requirement merits little further attention, since the entire position paper has been devoted to the historical development of a Federal trust responsibility to Indian education. A sound argument would rely on the language of the Court in Seminole Nation v. United States, referred to in the Summary and Conclusion, and Congressional acts which have borne out the validity of various forms of the trust responsibility. Also, the fiduciary standards imposed upon the Federal Government as trustee are of the highest moral

order, which correlates with education being recognized as an extremely vital aspect of the trust responsibility for the development of the American Indian. The important thing to keep in mind is that the legislative enactments of the Federal Government are to be viewed as practical manifestations of the judicially created fiduciary standard articulated in Seminole Nation.

B. Assurance that Indian Preference Will Be Implemented As a Policy for all of Indian Education

Indians have long been accorded special considerations in many different areas, including education. For example, the Supreme Court was asked to declare that § 12 of the Indian Reorganization Act of 1934, 25 U.S.C. § 472 (1963), which grants to Indians an employment preference in the Bureau of Indian Affairs, was violative of the antidiscrimination provisions of the Equal Employment Opportunity Act of 1972, 5 U.S.C. §§ 5108, 5314, 5315, 5316 (Cum. Supp. 1978); 42 U.S.C. §§ 2000e, 2000e-1-2000e-6, 2000e-8, 2000e-13-2000e-17 (1974), and that the Indian preference was also violative of due process. Morton v. Mancari, 417 U.S. 535 (1974). Instead, the Court stated that the overriding purpose of the 1934 Act was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically. Morton v. Mancari, supra,

at 542. One of the primary means to accomplish self-government would be to increase the participation of trial Indians in the B.I.A. operations. By the same token, the educational programs initiated under the 1934 Act would also contribute to the establishment of machinery enabling Indians to assume a greater amount of self-government. Thus, the educational programs of the 1934 Act and subsequent Indian educational legislation would also continue to be accorded special preference under the auspices of contributing to the self-government of Indian tribes.

The Court in Mancari also recognized as purpose of according Indian preference the furtherance of the Government's trust obligation toward the Indian tribes and the reduction of the negative effect of having non-Indians administer matters that affect Indian tribal life. This paper has already addressed the trust obligation to Indians and a Federal responsibility to Indian education. Indian education can then be seen as an attempt to comply with the general trsut obligation, and a vehicle to assure the employment within the Bureau of Indian Affairs of competent, capable Indians, familiar with the needs of Indian peoples and equipped with the knowledge to make a substantive contribution to the advancement of Indian people.

In summary, the Court in Mancari pointed out that hiring preference to Indians in the Indian service dates back at least as far as 1834. Morton v. Mancari, supra, at 540. Similarly, special educational provisions for Indian education date back as far as 1802 (the Act of March 30, 1802, 2 Stat. 139). The policy of according Indians educational preferences in Federal legislation has a long, continuing history. These educational preferences serve the same purposes as the employment preferences outlined in Mancari, and there is no sound, logical reason for discontinuing the educational preferences for Indians, in light of the key role and substantive benefits which Indians have realized from educational preference.

C. The Wording Will be American Indians, Alaska Natives, or Aleuts in Legislation Developing the Indian Education Section of the Department of Education.

Since the legislation will always be concerned with Indian education, it is fairly obvious that "American Indians" will be included as the beneficiaries of such legislation.

Alaska natives, Eskimos, and other aboriginal peoples of Alaska are to be considered as Indians in the Protection of Indians and Conservation of Resources sections within the United States Code. 25 U.S.C. § 479 (1963). This section is part of the Indian Reorganization Act of 1934, 48 Stat. 988, so Alaska aboriginal peoples have been included

within the Federal codifications relating to the delivery of services to Indian peoples at least since 1934. In addition, the rights of organization, adoption of a constitution, and incorporation by Charter accorded Indian tribes under 25 U.S.C. §§ 476, 477 (1963), have been extended to include the Territory of Alaska. 25 U.S.C. §§ 473, 473a (1963). Thus, the aboriginal peoples of Alaska have been included in the majority of the important benefits and special treatment which "Indians" are eligible to receive.

Key Indian education legislation has also included Alaska natives and Aleuts as being eligible for benefits which arise therefrom. For example, the Indian Education Act of 1972, 86 Stat. 334, has seen fit to include Alaska natives in the membership composition of the National Advisory Board on Indian Education, as appointed by the President. 86 Stat. 343 (1972). Also under the IEA, Section 453 states, "For the purposes of this title, the term "Indian" means any individual who. . .(3) is an Eskimo or Aleut or other Alaska Native. . ." 86 Stat. 345 (1972).

Alaska natives and Aleuts have also been included in the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 455-458e (Cum. Supp. 1978). Section 4(b) of the Act reads, "'Indian tribe' means any

Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (of 1971) (86 Stat. 688) which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians," 88 Stat. 2204 (1975). The previously mentioned codifications and inclusion of Alaska Natives and Aleuts within IEA attest to the fact that these particular peoples would meet the definition of "Indian tribe" under the 1975 Act.

Briefly, then, Alaska natives and Aleuts have been accorded educational treatment as "Indians" for quite some time. The continuation of this legislative policy appeals to us to require more of a combined political effort to assure its viability. A continuation of this policy will prove to be a significant contribution to the Alaska natives and Aleuts as they educate their young people in order to cope with the numerous social and economic problems which they presently face.

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